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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-208

ROBERT T. CARSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1972. The petition for a writ of certiorari was filed on August 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

18 U.S.C. 201, 371 and 1621 are set forth at Pet. App. B 28a-33a.

QUESTIONS PRESENTED

1. Whether on the facts of this case intercession with officials of the Department of Justice to secure favorable treatment for defendants in a federal criminal prosecution constitutes an "official act" within the meaning of 18 U.S.C. 201, when the intercession is corruptly made by the administrative assistant to a member of the Senate Judiciary Committee.

2. Whether certain testimony, which was elicited from a government witness on redirect examination without defense objection and pertained to a subject explored on cross-examination, deprived defendant of a fair trial.

3. Whether petitioner's claims of privilege before the grand jury constituted retraction of his previous false testimony.

4. Whether the prosecutor's statements and actions deprived petitioner of a fair trial.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of having conspired to travel in interstate commerce in furtherance of bribery (as defined in 18 U.S.C. 201), in violation of 18 U.S.C. 371 (count one), and of having committed perjury

before a federal grand jury, in violation of 18 U.S.C. 1621 (count four).[1] Two co-defendants, Joseph Bald, who testified at trial for the government, and Edward Adams, were charged with conspiracy and with having traveled in interstate commerce in furtherance of bribery; both pleaded guilty prior to trial. Petitioner was sentenced to concurrent terms of imprisonment for eighteen months and was fined $5,000 on the conspiracy count. The court of appeals affirmed in a comprehensive opinion (Pet. App. A 1a-25a).

The evidence showed that in the fall of 1970, Joseph Bald and Michael Hellerman learned that they were the subject of federal investigations relating to stock transactions. Hellerman suggested that they contact Edward ("Eddie") Adams, a man regarded by both as exercising considerable political influence, to see if he could halt the investigations (T. 547-548).[2]

Through the intercession of Bald's brother-in-law, co-conspirator Harold Blond, Bald met with Adams in November 1970, informed him of the pending investigations by the Securities and Exchange Commission and the United States Attorney's office, and requested his assistance in stopping the investigations (T. 549-550, 1033-1034). Adams agreed to help and indicated the matter would involve a con-

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[1] Petitioner was acquitted on two substantive charges of having traveled in interstate commerce in furtherance of bribery, in violation of 18 U.S.C. 1952 (counts two and three).

[2] "T." refers to the transcript of proceedings at trial.

siderable sum of money (T. 550, 1034). Adams informed Bald that he would attempt to arrange a meeting with petitioner, then administrative assistant to United States Senator Hiram Fong (T. 551, 1035). Adams indicated that the money would go to Senator Fong and to individuals in the Justice Department (T. 552, 1035).[3]

Shortly thereafter, Blond informed Bald that Adams had arranged a meeting in Washington, D.C. with petitioner, and in mid-November, Bald and Hellerman met with petitioner at the New Senate Office Building (T. 552, 554-555, 1036). Hellerman advised petitioner that he and Bald were under investigation and that indictments were expected in the near future. He offered petitioner $1,000,000 to abort the S.E.C. investigation (T. 557). Petitioner inquired whether the expected indictments might somehow be delayed and Hellerman indicated that delay was doubtful. Petitioner said he would look into the matter and later contact them through Adams (T. 556-558).

On November 19, 1970, an indictment—charging securities fraud, the sale of unregistered stock, mail fraud, and conspiracy—was filed in the Southern District of New York, naming Hellerman and fifteen others as defendants and Bald as a co-conspirator (T. 560). The following day, Adams informed Blond that he had spoken with petitioner who had indicated

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[3] There was no indication that Senator Fong was aware of the events leading to petitioner's conviction.

he was quite concerned about the persons named in the indictment, but, at best, could help only Bald and Hellerman (T. 1038).

On November 24, 1970, petitioner, having previously arranged an appointment (T. 1143), met with Richard Kleindienst, then Deputy Attorney General. Mr. Kleindienst testified that petitioner informed him that "he had a friend in New York who was in trouble, and that if I [Kleindienst] could help him with respect to his trouble, his friend was a man of substantial means and would be willing to make a contribution of between fifty and one hundred thousand dollars to the reelection of President Nixon" (T. 1143). When informed that the friend was under federal indictment, Mr. Kleindienst advised petitioner that he could not under any circumstances do anything about the matter, even look into it (T. 1143-1144). The conversation then shifted to another matter, a judicial appointment from the State of Hawaii (T. 1133-1144).[4] Mr. Kleindienst, in response to questioning on cross-examination, indicated that at the time of the meeting, he did not believe he had been offered a bribe (T. 1171, 1174-1176). It was

[4] Petitioner testified that the meeting with Mr. Kleindienst was solely for the purpose of discussing a controversy surrounding a pending judicial appointment. He stated that he mentioned the fact that two persons had approached him about a problem and had indicated a willingness to make a contribution of $50,000 to the Republican Party. Petitioner also testified that he told Mr. Kleindienst that because there was an S.E.C. indictment, he had informed the men that he could not help them and that Mr. Kleindienst had stated he was correct in doing so (T. 1383-1384).

established that information concerning an investigation involving petitioner was later brought to his attention through an F.B.I. report to the Attorney General (T. 1168-1171).[5] On redirect examination, Mr. Kleindienst indicated that the report caused him to conclude that petitioner had in fact offered a bribe (T. 1178) and he reported the substance of his conversation with petitioner to the Attorney General (T. 1144-1145).

Shortly after the indictment was filed, Hellerman, who at this point was cooperating with the government, informed Bald that he knew someone who was willing to finance a "fix" and that he wanted that person to meet Adams (T. 562). Bald, again through the intercession of Blond, met with Adams, informed him that someone was available to provide $200,000 to fix the case, and arranged a meeting (T. 563-565).

On November 29, 1970, Hellerman met with Bald and Blond and introduced F.B.I. Agent Paul Brana to them as "Paul Bicera," the man who was going to finance the "fix" (T. 565, 1040, 1045). Brana feigned skepticism as to Adams' ability to fix the case, and Blond, relating numerous activities of Adams, attempted to persuade him that Adams was sufficiently influential (T. 630-631). Blond also informed Brana that United States Senator Hiram Fong was a member of the Judiciary Committee and could handle the matter (T. 631). He told him of the previous meeting with petitioner and indicated that

[5] The trial court disallowed questioning about the nature of the information contained in the F.B.I. report (T. 1177-1178).

$200,000 would be required to cover Bald and Hellerman on the pending as well as any future indictments (T. 629, 635).

Adams then arrived at the meeting and advised that because the indictment was filed so shortly after the meeting with petitioner, petitioner had not had time to act. Adams assured Brana that Senator Fong, as a member of the Judiciary Committee, was quite influential in Washington. He also stated that Attorney General Mitchell had given his handshake on the matter (T. 567, 636). Brana continued to feign skepticism and Adams stated that in order to satisfy Brana he would arrange a meeting between him and petitioner (T. 637). A meeting was arranged (T. 570, 1056).

On December 1, Brana, equipped with a recording device, went with Blond and Adams to Senator Fong's office in Washington. Petitioner met privately with Adams for a brief period and then with Blond and Brana, who was introduced to petitioner as Paul Bicera (T. 640-641, GX 4).[6]

Petitioner indicated to Brana that "[they] might have been able to do something" had Hellerman and Bald been successful in delaying the indictment (GX 4, p. 1). Petitioner also indicated that in the future, after the publicity had died down, he might be able to obtain leniency for Hellerman (GX 4, p. 1). Brana inquired whether "as far as the two fellows we are interested in * * * [was there any] chance to get it

[6] "GX" refers to government exhibits (here, the transcripts of the recordings) introduced at trial.

squashed" and petitioner responded, "No, and that's from the top man" (GX 4, p. 3). Petitioner again explained that the case was "too hot" because of the publicity and advised Brana not to waste his money at this time (GX 4, pp. 2, 4).

Brana thereafter informed Adams that the $200,000 had not been deposited in the bank pursuant to prior arrangements. Adams became perturbed and returned to advise petitioner concerning the money. Blond and Brana returned to New York and during the trip Brana learned that he was supposed to have brought $2,000 for petitioner (T. 644-645, 1066-1068).

Bald, Hellerman and Brana met on December 22. Bald expressed concern over possible new indictments and urged Brana to have the $200,000 available. Bald also assured Brana that petitioner was in a position to handle any new indictments (T. 646-648). On December 24, Brana again met with Bald, Hellerman and Adams. Adams advised that petitioner could handle the problem of new indictments and that because of his and Blond's involvement elsewhere, Brana would have to deal directly with petitioner. He informed Brana that a new price of $100,000, all of which was for petitioner, had been set and that Brana and petitioner should work out a schedule of payment related to the manner in which petitioner performed. Adams then asked for and received from Brana $200 in expense money. Adams also asked whether Brana had the $2,500 to be given petitioner as an advance, and Brana showed him the money (T. 651, 655).

On December 29, Brana, again equipped with a recording device, met with Adams and gave him the $2,500 in cash. Adams and Brana then went to Senator Fong's office where Adams, having made it clear that the money was for petitioner, gave him the $2,500 (GX 1a, p. 3; T. 656). Brana then advised petitioner that new securities indictments against Bald and Hellerman were anticipated and that, if they were filed, the leniency for Hellerman which petitioner had mentioned previously would be virtually impossible to secure (GX 1a, pp. 3, 4, 6). Petitioner indicated that he would try to stop the indictments but was unsure of success even though he claimed to "deal right off the top on these things" (GX 1a, pp. 4-5). Petitioner stated that he would need to know in advance if the indictments were to be filed and Brana advised that they were being prepared. Petitioner said he would work on the matter (GX 1a, p. 12). A price of $100,000 was agreed upon if petitioner stopped the new indictments and obtained leniency for Hellerman. Although discussion of the details of the manner in which payment would be made was deferred, petitioner hinted it would be in the form of a campaign contribution (GX 1a, pp. 13-14).

On January 6, 1971, petitioner, in response to a subpoena, appeared before a federal grand jury in the Southern District of New York. He was fully advised of his rights and was informed that he was a target of the investigation. He denied knowing or having ever heard the names of Adams, Bald, Heller-

man or "Bicera." He was shown a photograph of Agent Brana and stated that he did not recognize him (GX 1a, pp. 7-8; T. 1273). After further questioning, petitioner refused to answer several questions, including ones concerning his involvement with Adams and "Bicera," on grounds of self-incrimination and congressional immunity (Pet. 18-19).

Petitioner testified at trial and denied any participation in a scheme to pay or receive a bribe. He stated that he believed the $2,500 received from Adams was a campaign contribution for Senator Fong from a Robert Brinsmade. He acknowledged the meeting with Bald and Hellerman but denied Bald's version of that meeting. He also acknowledged the meetings with Adams, Blond, and Brana but denied that they were conducted pursuant to a bribery scheme. He characterized the recorded incriminating statements which were introduced into evidence as attempts on his part to terminate the conversations (T. 1450).

Petitioner conceded at trial that his grand jury testimony had been inaccurate but claimed he had not recognized Brana from the photograph and had denied knowing Edward Adams because he knew him as Eddie Adams (T. 1412).

ARGUMENT

1. Petitioner contends (Pet. 20-28) that, although he could properly have been convicted of having conspired to offer then Deputy Attorney General Kleindienst a bribe for the purpose of influencing the

course of a criminal prosecution (Pet. 25), he was erroneously convicted of conspiracy to accept a bribe to influence his own "official acts." His contention is that his actual and promised intercession with the Department of Justice involved his "personal" or "political" activities rather than "official acts" within the contemplation of 18 U.S.C. 201. He argues in support of this position that as administrative assistant to a senator he was not a public official empowered or apparently empowered to affect the course of a criminal proceeding. Because the court's charge (Pet. 22) permitted the jury to convict petitioner on this allegedly improper basis, he argues that the conspiracy conviction cannot be sustained.[7]

It is clearly established, however, as the court below noted (Pet. App. A 17a), that the federal bribery statute extends to conduct of a government employee whose advice or recommendation would be influen-

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[7] In the court of appeals, petitioner's primary argument related to the alleged inadequacy of the court's instructions with respect to conspiracy to commit bribery and the definition of "official act" found in 18 U.S.C. 201. Petitioner never requested an instruction on "official act" nor did he make any meaningful objection to the court's instructions (Pet. App. A 15a; T. 1766-1767).

After deliberating for approximately thirteen hours, the jury requested clarification of the definition of bribery, the relation thereto of "official acts," and other matters (T. 1842-1857). The court reviewed the jury's requests with counsel and indicated what its proposed responses would be. Defense counsel agreed that the court should read the bribery statute to the jury, including the definition of "official act" contained therein (T. 1842-1843), and took no exception to the supplemental charge.

tial, regardless of whether the official is without specific authority to make a binding decision with respect to the matter. See *United States* v. *Heffler*, 402 F. 2d 924, 926 (C.A. 3), certiorari denied *sub nom. Cecchini* v. *United States*, 394 U.S. 946; *Parks* v. *United States*, 355 F. 2d 167, 168-169 (C.A. 5); *Wilson* v. *United States*, 230 F. 2d 521, 524-525 (C.A. 4), certiorari denied, 351 U.S. 931; *Krogmann* v. *United States*, 225 F. 2d 220, 224-225 (C.A. 6); *Hurley* v. *United States*, 192 F. 2d 297, 299-300 (C.A. 4); *Canella* v. *United States*, 157 F. 2d 470, 480-481 (C.A. 9). Here the district court instructed the jury that a finding of bribery could not be sustained if the action sought "was so far outside the purview of the official's duties or possible power or possible authority that it would be unreasonable for any reasonable man to have supposed that he could have done anything about that particular subject" (T. 1868). Petitioner did not except to this charge. There is certainly no reason to believe the instruction, which was adequate to prevent conviction in the absence of a finding that petitioner appeared officially empowered to act on behalf of Bald and Hellerman, was ignored by the jury, which was painstaking and conscientious in its deliberations. See Pet. App. A 12a, n. 8.

There was sufficient evidence from which the jury could conclude that the object of the conspiracy was to gain corruptly the use of petitioner's official position as Senator Fong's administrative assistant, to influence the course of existing or anticipated crimi-

nal prosecutions, and that the objective was an apparently realistic one. Petitioner represented that he was, under certain circumstances, in a position to bring influence to bear upon decision-making with respect to federal criminal investigations. Petitioner's official duties included exerting the influence of the Senator's office on behalf of the Senator's constituents and others in their dealings with governmental agencies (T. 1380-1381, 1514, 1538). As the court of appeals noted, the exertion by administrative assistants of "the influence inherent in their employment relationship with members of Congress appears 'clearly established by settled practice,' " citing *United States* v. *Birdsall*, 233 U.S. 223, 231 (Pet. App. A 19a). Attempts to influence other branches of government are "an established and accepted part of the role" of Congressmen. *United States* v. *Brewster*, No. 70-45, decided June 29, 1972 (slip op., p. 23; and see *id.*, p. 11).[8] As the court below further observed, petitioner's official position as it related to

[8] Petitioner argues in light of the "horsetrading" that takes place in representing the interests of constituents that it is unlikely that Congress intended such exertions to be outlawed by Section 201 (Pet. 28). But the critical fact is this: the present prosecution does not involve a good faith effort by a legislator or his aide to bring to the attention of a government agency the merits of a constituent's cause. Instead, what was proved here was a corrupt deal which envisioned substantial personal profit for a government official for influencing the criminal process. Whatever may be the range of permissible entreaty under other circumstances, Congress has made it a crime under Section 201 to agree to accept "anything of value" for this effort.

dealings with the Department of Justice was "enhanced * * * by the status of his employer's membership in the one most powerful congressional committee [Senate Committee on the Judiciary] affecting that Department's operations" (Pet. App. A 19a). Thus, petitioner clearly appeared empowered to act (*United States* v. *Birdsall*, 233 U.S. 223), and he was represented to Bald, Hellerman and Brana not as a private individual with personal political influence but as the administrative assistant to Senator Hiram Fong of the Senate Judiciary Committee.

Petitioner held himself out as being able to reach persons highly placed in the Justice Department (GX 1a, pp. 4-5), and he did have access to high Department officials. The key importance of his official status in promoting this scheme is underscored by the fact that the meeting with Mr. Kleindienst at which petitioner appeared to make the offer of a bribe was arranged for the ostensible purpose of presenting Senator Fong's views with respect to the filling of a vacant judicial position (T. 1381-1386). In these circumstances, it is evident that petitioner's attempt to exert influence on behalf of Bald and Hellerman was made while petitioner was acting in an official capacity and not in the capacity of a private "influence peddler" engaged in "a personal frolic of his own" (Pet. 27).

The jury was reasonably entitled to conclude, as did Adams, Bald, and Hellerman, that petitioner's influence derived from his official position. His acceptance of money to exert that influence on behalf of

Bald and Hellerman was precisely the kind of conduct at which the federal bribery statute is aimed—the misuse of a public office for personal gain.

2. Petitioner claims (Pet. 29-32) that he was deprived of a fair trial by the admission of certain opinion testimony from then Deputy Attorney General Kleindienst. On cross-examination, defense counsel elicited from Mr. Kleindienst that he had made no report of the November 24th conversation with petitioner until the following week, when he had been shown an F.B.I. memorandum to the Attorney General concerning an investigation involving petitioner (T. 1168-1171). Defense counsel also asked whether, as of November 24, he believed that petitioner had offered him a bribe and Mr. Kleindienst responded that he had not initially interpreted the conversation as a bribe attempt (T. 1174).

On redirect examination, the trial court sustained an objection to questioning related to the nature of the information contained in the F.B.I. memorandum (T. 1177-1178). Mr. Kleindienst was then asked whether, after having learned of the investigation of petitioner, he considered the November 24th conversation with petitioner to have been a bribe offer. Without objection he said yes (T. 1178).[9]

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[9] Petitioner's contention (Pet. 31) that the question was in direct violation of the court's ruling is erroneous. The trial court's prior ruling prohibited questioning about facts brought to Mr. Kleindienst's attention on December 1, 1970, not his state of mind on that date.

The court of appeals concluded that the question —"a statement of opinion based not upon personal observation but upon inadmissible hearsay evidence, *i.e.*, the government memorandum"—was objectionable. The court, however, concluded that its admission was not plain error since the question was posed "in rebuttal to a matter probed on cross-examination, seeking to cast doubt on the witness' credibility at trial" (Pet. App. A 22a). This holding was proper and warrants no further review. The power to notice plain error should be exercised "cautiously and only in exceptional circumstances" (3 Wright, *Federal Practice and Procedure: Criminal* § 856, p. 373), and if any error was committed by the trial court in admitting Mr. Kleindienst's testimony, it was not of such magnitude as to warrant its exercise here.

3. Petitioner also contends (Pet. 33-35) that his claims of congressional privilege and of the privilege against self-incrimination with respect to questions concerning his involvement with Bald, Adams, and Brana constituted a retraction of his previous answers. The court below aptly termed this argument "wholly devoid of substance" (Pet. App. A 22a). Assertion of the privilege against self-incrimination (and, by analogy, of a congressional privilege) does not, as the court of appeals noted, imply any fact. See *Grunewald* v. *United States*, 353 U.S. 391, 415-424. Claims of privilege cannot reasonably be construed as acknowledgements and retractions of false testimony.

4. The court of appeals properly rejected petitioner's final contention (Pet. 35-39) that "the prosecutor's credibility and personality became such central factors that the petitioner was deprived of a fair trial" (Pet. 35). The transcript references relied upon by petitioner (Pet. 35; T. 1445, 1465-1468, 1507-1508, 1653-1656, 1674, 1683) do not show or even suggest that the prosecutor's personality and credibility were in any way "factors" or in issue at the trial. The prosecutor, Assistant United States Attorney Morvillo, had participated in the investigation leading to Hellerman's indictment and he was thus familiar with some of the people and events which formed the background of the conspiracy in which petitioner participated; contrary to petitioner's suggestion (Pet. 39), this history made it appropriate for Morvillo to prosecute this case, and it did not turn the case "into a contest between himself and the petitioner" (*ibid.*).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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